IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF SOUTH CAROLINA

Jose Padilla,	)	
	)	
Petitioner	)	
	)	
v.	)	**C/A No. 02:04-2221-26AJ**
	)	
Commander C.T. Hanft,	)	**Respondent's Motion for Stay**
U.S.N. Commander,	)	**Pending Appeal**
Consolidated Naval Brig,	)	
	)	
Respondent	)	
	)	

Pursuant to Fed. R. App. P. 8(a)(1) and Fed. R. Civ. P. 62, Respondent Commander C.T. Hanft, Commanding Officer of the Consolidated Naval Brig in Charleston, South Carolina, by and through undersigned counsel, respectfully submits this Motion for Stay Pending Appeal of the Court's order directing petitioner's release from military custody by April 14, 2005.

The government is filing a notice of appeal concurrently with this motion. Rule 62 provides that "[w]hen an appeal is taken from * * * final judgment granting * * * an injunction, the court in its discretion may suspend * * * [the] injunction during the pendency of the appeal upon such terms as to bond or otherwise as it considers proper for the security of the rights of the adverse party." Fed. R. Civ. P. 62(c); *see* Local Rule 62.02. Other federal courts adjudicating the rights of enemy combatants, including the Second Circuit in this very case, have granted stays of their orders pending appeal by the government. *See Padilla* v. *Rumsfeld*, No. 03-2235 (2d Cir.), Order dated Jan. 22, 2004 (staying decision in this case pending the government's petition for certiorari); *In re Guantanamo Detainee Cases*, No. 02-CV-0299 (D.D.C.), Order dated Feb. 3, 2005 (staying, pending appeal, the court's denial of the government's motion to dismiss habeas corpus claims brought by

individuals detained militarily at Guantanamo Bay). The Fourth Circuit likewise stayed multiple orders of the district court in the related *Hamdi* v. *Rumsfeld* litigation pending the government's appeals. *See Hamdi* v. *Rumsfeld*, No. 02-6895 (4th Cir.), Order dated June 14, 2002; *Hamdi* v. *Rumsfeld*, No. 02-6827 (4th Cir.), Order dated May 31, 2002. The government respectfully suggests that this Court should follow the same course.

The four factors "regulating the issuance" of a stay pending appeal are well settled:

> (1) whether the stay applicant has made a strong showing that he is likely to succeed on the merits; (2) whether the applicant will be irreparably injured absent a stay; (3) whether issuance of the stay will substantially injure the other parties interested in the proceeding; and (4) where the public interest lies.

Hilton v. *Braunskill*, 481 U.S. 770, 776 (1987). Those four factors are not prerequisites to be met, but rather considerations to be "balanc[ed]." *Long* v. *Robinson*, 432 F.2d 977, 980 (4th Cir. 1970). Thus, "[t]he probability of success that must be demonstrated is inversely proportional to the amount of irreparable injury plaintiffs will suffer absent the stay. * * * Simply stated, more of one excuses less of the other." *Mich. Coalition of Radioactive Material Users, Inc.* v. *Griepentrog*, 945 F.2d 150, 153 (6th Cir. 1991); *accord Cuomo* v. *United States Nuclear Regulatory Comm'n*, 772 F.2d 972, 974 (D.C. Cir. 1985). In habeas corpus cases, therefore, "[w]here the [government] establishes that it has a strong likelihood of success on appeal, or where, failing that, it can nonetheless demonstrate a substantial case on the merits, continued custody is permissible if the second and fourth factors in the traditional stay analysis militate against release." *Hilton*, 481 U.S. at 778. Here, all four factors weigh in favor of a stay.

1. *First*, there is a sufficiently strong probability that the government will prevail on appeal. Although this Court rejected the government's submission, that is always the posture in which a district court evaluates a motion to stay its decision pending appeal, and here there are

ample reasons to think that the court of appeals may take a different view. The Supreme Court held that the President had authority to order the detention by the military of another United States citizen, Yaser Hamdi. *Hamdi* v. *Rumsfeld*, 124 S. Ct. 2633, 2639-2644 (2004) (plurality opinion); *id*. at 2679 (Thomas, J., dissenting); *see also Hamdi* v. *Rumsfeld*, 316 F.3d 450, 467-468 (4th Cir. 2003), *vacated on other grounds*, 124 S. Ct. at 2643-2652. The only fact that distinguishes petitioner from Hamdi is his locus of capture: Hamdi was captured abroad in Afghanistan, whereas petitioner was detained in the customs inspection area of Chicago's O'Hare International Airport. The Supreme Court's decision in *Ex parte Quirin*, 317 U.S. 1 (1942), confirmed that locus of capture is not a determinative factor by rejecting the notion that Nazi saboteurs in America were "any the less belligerents if, as they argue, they have not actually * * * entered the theatre or zone of active military operations." *Id*. at 38; *see also id*. at 36-37 ("[E]ntry upon our territory in time of war by enemy belligerents, including those acting under the direction of armed forces of the enemy[,] * * * is a warlike act.").

Although this Court distinguished *Quirin* primarily on the ground that the express congressional authorization present there is lacking here (see Opinion and Order (Op.) 14), reasonable jurists have disagreed about that point. In this very case, Circuit Judge Wesley and District Judge Mukasey concluded that the Authorization for Use of Military Force (AUMF), Pub. L. No. 107-40, 115 Stat. 224, § 2(a) (2001)—which empowers the President to "use all necessary and appropriate force" against al Qaeda—includes within its scope combatants who plot to attack this country's homeland on al Qaeda's behalf and are then captured within the Nation's borders. *Padilla* v. *Rumsfeld*, 352 F.3d 695, 728-732 (Wesley, J., concurring in part and dissenting in part); *Padilla* v. *Bush*, 233 F. Supp. 2d 564, 587-599 (S.D.N.Y. 2002); *but see Padilla*, 352 F.3d at 710-

724 (concluding that President lacks authority to detain petitioner militarily), *rev'd*, 124 S. Ct. 2711. In the course of dismissing another habeas corpus lawsuit brought by individuals detained militarily pursuant to the AUMF, the United States District Court for the District of Columbia likewise rejected the contention that the AUMF authorizes only battlefield detentions: "The fact that petitioners in this case were not captured on or near the battlefields of Afghanistan, unlike the petitioner in *Hamdi*, is of no legal significance * * * because the AUMF does not place geographic parameters on the President's authority to wage this war against terrorists." *Khalid* v. *Bush*, Nos. 04-1142 & 04-1166, 2005 WL 100924, at *5 (D.D.C. Jan. 19, 2005).

The fact that this issue has so divided the courts is itself a strong indication that the government has a sufficient likelihood of success on appeal to warrant a stay. Indeed, Judge Mukasey recognized the closeness of the issues by agreeing to certify his decision upholding the President's authority for interlocutory review. *See Padilla* v. *Rumsfeld*, 256 F. Supp. 2d 218 (S.D.N.Y. 2003). Even more tellingly, the Second Circuit stayed its decision ordering petitioner's release pending the government's petition for a writ of certiorari — a decision that necessarily reflected that court's conclusion that there was "a significant possibility that the judgment [would] be reversed." *Barnes* v. *E-Systems, Inc. Group Hosp. Med. & Surgical Ins. Plan*, 501 U.S. 1301, 1302 (1991) (Scalia, J., in chambers) (noting that this is one of the "conditions that must be met" to justify stay pending petition for certiorari); *see White* v. *Florida*, 458 U.S. 1301, 1302 (1982) (Powell, J., in chambers) (same). If anything, the government has a stronger case for a stay here than it did before the Second Circuit because the Supreme Court's review of that court's decision—unlike the Fourth Circuit's review of this Court's order—was discretionary.

2. *Second*, the government will suffer irreparable harm absent a stay of the Court's

order. The President—as Commander in Chief of the armed forces and in accordance with the AUMF—has determined that petitioner "represents a continuing, present and grave danger to the national security of the United States" and that his *military* (as opposed to *civilian*) detention is "necessary to prevent him from aiding al Qaeda in its efforts to attack the United States or its armed forces, other governmental personnel, or citizens." President's Order ¶ 5 (Exh. A to Answer). By directing petitioner's release from military custody on the theory that "this is a law enforcement matter, not a military matter" (Op. 21-22), this Court not only overturned the President's determination regarding petitioner, it also eliminated a critical aspect of the President's Commander-in-Chief authority — the ability to order the military capture and detention of enemy combatants who enter the United States bent on attacking civilians and the homeland. *See Quirin*, 317 U.S. at 28-29 ("An important incident to the conduct of war is the adoption of measures by the military command not only to repel and defeat the enemy, but to *seize* * * * those enemies who * * * have violated the law of war." (emphasis added)). Moreover, the Court undermined that core Executive function at a time when the United States remains vulnerable to future attacks by al Qaeda terrorists. *See Global Intelligence Challenges 2005, Meeting Long-Term Challenges with a Long-Term Strategy: Testimony Before the Senate Select Committee on Intelligence* (Feb. 16, 2005) (statement of Porter J. Goss) (testifying that al Qaeda remains "intent on finding ways to circumvent U.S. security enhancements to strike Americans and the [h]omeland," and that "[i]t may be only a matter of time before [al Qaeda] or another group attempts to use chemical, biological, radiological, and nuclear weapons"), *available at* <http://www.cia.gov/cia/public_affairs/speeches/2004/Goss_testimony_02162005.html>; *see also* Douglas Jehl, *U.S. Aides Cite Worry on Qaeda Infiltration from Mexico*, N.Y. Times, Feb. 17, 2005, at A16 (citing testimony of CIA Director Goss,

FBI Director Robert S. Mueller, and Deputy Secretary of Homeland Security Admiral James M. Loy), *available at* 2005 WLNR 2228311.

The order, if not stayed, would preclude the President from exercising a power he believes to be necessary to prevent future terrorist attacks. In the event that the court of appeals or the Supreme Court vindicates the President's authority and reverses this Court's decision, any lapse in the President's ability to exercise his constitutional authority would plainly amount to irreparable injury. Significantly, the Second Circuit necessarily concluded as much when it stayed its order of release pending the government's petition for writ of certiorari. *See Barnes*, 501 U.S. at 1302 (Scalia, J., in chambers) (applicant for stay pending petition for certiorari must demonstrate "a likelihood of irreparable harm (assuming the correctness of the applicant's position) if the judgment is not stayed"); *Times-Picayune Pub. Corp.* v. *Schulingkamp*, 419 U.S. 1301, 1305 (1974) (Powell, J., in chambers) (same).

3. *Third*, any potential injury to petitioner does not outweigh the need for a stay. This Court's order does not mandate petitioner's unconditional release from federal custody, but instead requires only petitioner's release from *military*, as opposed to *civilian*, custody. Op. 23; *see also id.* at 23 n.14 ("[T]he [g]overnment can bring criminal charges against [p]etitioner or it can hold him as a material witness."); *id.* at 21-22 (listing crimes with which petitioner could potentially be charged). Although there are significant differences between military and civilian custody, especially from the government's standpoint, it is significant that this Court's order permits the government to continue to confine petitioner. Thus, the liberty interest that ordinarily justifies a presumption in favor of a successful habeas petitioner's release pending appeal, *see* Fed. R. App. P. 23(c), is not present here.

Illustrative on this score is the Seventh Circuit's decision in *Walberg* v. *Israel*, 776 F.2d 134 (7th Cir. 1985) (Posner, J.). There, Walberg successfully petitioned for habeas corpus relief on grounds that he was denied effective assistance of counsel during his state burglary trial. *See id*. at 135. The court "ordered the state to release him *unless* it gave him a new trial within 120 days." *Ibid*. (emphasis added). The court stayed its mandate so that the state could seek further review, and declined to order Walberg's release in the meantime, because he was "not entitled to an *unconditional* release" and there was "no reason to suppose that the state [could] not retry him in an error-free trial and convict him." *Id*. at 136 (emphasis added); *see also Hernandez* v. *Dugger*, 839 F. Supp. 849, 850-854 (M.D. Fla. 1993) (staying pending appeal an order that would have required the state to release a successful habeas petitioner within 180 days or to retry him). This Court's order is similarly conditional, in that petitioner will not be released unless the government declines to charge him with a crime. Thus, a stay is warranted here.

It also bears emphasis that petitioner chose to mount a legal—as opposed to factual—challenge to his detention with the recognition that it could take time for the legal issue to work its way through the appellate process. 9/14/04 Tr. 37-38; *see also id.* at 23-24, 27-36. The Fourth Circuit has also demonstrated its ability to resolve questions like this with expedition. *See Hamdi* v. *Rumsfeld*, 296 F.3d 278 (4th Cir. 2002) (reversing order issued 31 days earlier); *Hamdi* v. *Rumsfeld*, 294 F.3d 598 (4th Cir. 2002) (reversing order issued 28 days earlier).

4. *Fourth*, and finally, the public interest favors a stay. Especially with respect to judgments about foreign policy and national security, it must be presumed that the President acts with the public interest in mind. *See United States* v. *Curtiss-Wright Export Corp.*, 299 U.S. 304, 320 (1936) (discussing President's role "as the sole organ of the federal government in the field of

international relations"). In this case, the President explicitly determined that "it is in the interest of the United States that the Secretary of Defense detain [petitioner] as an enemy combatant." President's Order ¶ 6. Part and parcel of that conclusion is the judgment that *civilian* detention will not suffice to ensure the Nation's security. The government has argued in this Court, and will argue on appeal, that the President has both constitutional and statutory authority to make that judgment for the people of the United States. If our position is vindicated in the Fourth Circuit or the Supreme Court, it is *a fortiori* in the public interest for petitioner to be detained militarily, including during the pendency of the appeal in this case.

In *Hamdi*, the Supreme Court "anticipate[d] that a District Court would proceed with the caution that we have indicated is necessary in this setting" by "pay[ing] proper heed both to the matters of national security that may arise in an individual case and to the constitutional limitations safeguarding essential liberties." 124 S. Ct. at 2652. Especially in a case like this, where reasonable jurists have disagreed, a stay pending appeal is fully consistent with the Supreme Court's admonition to proceed with caution. Thus, this Court should follow the lead of the other courts that have stayed their orders in enemy combatant litigation pending appeal. *See supra* pp. 1-2.

CONCLUSION

For the foregoing reasons, this Court should stay its order pending final disposition of the government's appeal in the Fourth Circuit or the Supreme Court.

Respectfully submitted,

JONATHAN S. GASSER
United States Attorney
District of South Carolina

DAVID B. SALMONS
DARYL JOSEFFER
Assistants to the Solicitor General

STEPHAN E. OESTREICHER, JR.
Attorney, United States Department of Justice
Criminal Division, Appellate Section

S/
MILLER W. SHEALY, JR.
Assistant United States Attorney
District of South Carolina
151 Meeting St.; Suite 200
Charleston, SC 29401
Phone: (843) 266-1669
Fax: (843) 727-4381